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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 448 OF 2004

Indian Lead Ltd. .. Petitioners.

vs.

R.L. Dalal & Co. Pvt. Ltd., .. Respondents.

Mr.A.S. Khandparkar with Kedar Wagle and
V. Chandra Shekhar for petitioners.

Mr. S. Sen i/by Udawadia Udeshi & Co.
for respondents.

CORAM : S.U.KAMDAR, J.

DATE : 23rd DECEMBER, 2004.

ORAL JUDGMENT :

1. By the present petition, the petitioners are seeking to set aside an award dated 10.6.2004 passed by the arbitrator Justice S.C. Pratap (Retired Judge of this Court). Some of the material facts of the present case are briefly enumerated are as under :-

2. Tenders were invited by the petitioners for carrying out civil and structural works for their factory building at Wada, Thane. On 31.1.1997, the respondent gave their quotation for the said work.

The petitioners accepted the said offer of the respondents by their letter dated 31.4.1997 and released the letter of intent and appointed the respondent as the contractor. Under the terms of the contract, the contract value was Rs. 4.85 lacs and was required to be completed within a period of 9 1/2 months.

3. It is the case of the petitioner that on 22.4.1997, the petitioner requested the respondent to deviate from the terms and conditions of the contract and asked that the contract should be completed not in one stage but in a phasewise manner. On 4.8.1997, the respondent alleged that there is a breach of the terms and conditions of the contract on the part of the petitioners since they have deviated from the contract and reduced the scope of the contract by almost 80% of the work. The respondent ultimately raised their claim by their letter dated 16.9.1997 and subsequently invoked an arbitration clause. By the consent of the parties, by an order of this Court dated 28.8.1998, Justice S.C. Pratap (retired Judge of this Court) was appointed as an arbitrator in the matter. There were about 50 hearings and after detailed hearing and evidence between the parties, the learned Arbitrator has given the impugned award dated 10.6.2004 wherein the learned Arbitrator has directed the respondent to pay to the petitioner a

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sum of Rs. 92,19,484/- with interest thereon of Rs. 14,72,822/- at the rate of 18% per annum and further interest at the rate of 10% on the principal amount of Rs. 92,19,484/- if the awarded amount is not paid within a period of six months then the interest to run at the rate of 18% from the date of the award. It is this award which is the subject matter of challenge before me.

4. The award has been challenged on two grounds by the learned counsel for the petitioner. Firstly, that the award passed by the learned Arbitrator is contrary to the terms and conditions of the contract and as such the same is liable to be set aside. The second contention raised is that the award is contrary to public policy and against the substantive law between the parties and thus also the said award is liable to be set aside.

5. In support of the aforesaid grounds of challenge, the learned counsel for the petitioners has contended that in so far as the claim no. 3 is concerned, which is for the loss of profit on balance value of the contract of Rs.37,23,354.00, the same is not permissible and the arbitrator has erred in granting the said claim. The learned counsel for the petitioner has relied upon clause 3 of the agreement between the parties which inter alia provides that the owner will have the

discretion to alter, add or cancel any of the items of work shown in the schedule without assigning any reason whatsoever and that the contractor shall not be entitled to claim compensation for any such omission, alteration, addition and/or cancellation. Relying upon the said clause 3 of the contract, the learned counsel for the petitioners has contended that the claim no. 3 pertaining to the loss of profit on balance value of the contract is inadmissible as it is prohibited by clause 3 of the said contract. It has been contended that it is the sole discretion of the petitioner as an owner to delete any of the items in the schedule and reduction or change in the scope of work even to an extent of 80% of value of the contract means nothing but omission of an item from the schedule of the contract and thus by virtue of clause 3, the claim was inadmissible and the arbitrator erred in granting the aforesaid claim. In paragraphs 17 to 28 of the said award, the learned arbitrator has considered the aforesaid contentions of the petitioner and after considering the scope and terms of the said clause 3 of the contract has held that clause 3 on its true and proper interpretation does not include a change in the scope of work or termination of the contract in the midst and/or refusing to permit the respondent to complete the contract as awarded. The learned arbitrator has held that clause 3 only applies in case of any item

in the schedule is omitted, added or cancelled. The learned arbitrator has held that clause 3 being in the nature of an exemption clause, the same has to be strictly construed because it is the exception to the general rule and cannot be liberally construed so as to include all omissions or reduction in the value of the contract as contended by the petitioner herein. After relying upon series of judgments of various courts, the learned arbitrator has given a reasoned finding holding that clause 3 has no application in case where 80% of structural work has been reduced under the guise of the phased manner implementation. It is further held by the learned Arbitrator that even according to the petitioner this phased manner implementation itself belies their case that clause 3 applies to the facts of the present case. The learned arbitrator has given cogent reasons by relying upon various judgments of this Court as well as Apex Court. I do not see any reason to differ from the view of the learned arbitrator as aforesaid in the award. I am of the opinion that the prohibition contained in para. 3 of the contract does not apply when either there is termination of the contract or there is an unilateral reduction in the contract value of the work or any total change in the nature or scope of the contract of the work. In any event, I am of the opinion that ultimately the issue depends on a true and proper interpretation of clause 3 of the contract. As it

is settled law that interpretation of the terms and conditions of the contract is in exclusive jurisdiction of the arbitrator and this Court cannot go into it even if there are two views possible. I am of the further opinion that clause 3 does not provide for such a prohibition that in no case whatsoever a claim for damages can be granted. Clause 3 prescribe a condition precedent for disallowing the claim. Whether such a condition on the facts and circumstances of the present case is fulfilled or not is for the arbitrator to decide. The arbitrator has decided that the said clause is not applicable where there is reduction in the structural work of around 80% i.e. part of the contract has been jettisoned. In my view, therefore, the reasoning given by the learned arbitrator is legal and valid and does not require any interference from this Court in its exercise of jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

6. This leads me to the second contention which has been advanced by the learned counsel for the petitioner pertaining to clause 50 of the said contract. The said clause 50 of the contract reads as under :-

"50. The Contractor's rate shall include clearing of all vegetation, shrubs, bushes,

stumps, scots, logs and other perishable and objectionable organic materials including carting away, disposing, burning, stacting, spreading, etc. anywhere within the plot as directed by Engineers-in-charge. The Contractor shall sari all the Units on the plot. The same will be approved by the Owner/Architect and only after making necessary modifications, if any, shall the actual excavation be started."

By relying upon the said clause 50 of the contract, the learned counsel for the petitioner has contended that the value of the contract included operating cost for removal of vegetation, shrubs and objectionable organic material and that is not to be separately paid. The learned counsel for the petitioner has contended that while awarding claim no. 8, which is for outstanding amount remaining unpaid in relation to the reduced value of work executed and completed by the claimants, the arbitrator has taken into consideration also the cost of removing the objectionable organic materials.

7. I have perused the statement of claim in so far as it pertains to the claim no. 8. The said claim no. 8 is set out in para. 12.8 of the statement of claim and the particulars thereof are

set out in CA 8 at page 115 of the compilation. If the break up of the amount claimed for said balance of work is looked into in Annexure CA-8 of the statement of claim, it is clear that no amount for removing the objectionable organic material is included in the said claim. However, the learned counsel for the petitioner thereafter contended that the said amount of the final bill is not certified by the consultant/architect and as such not payable. It is undoubtedly true that there were disputes between the respondent and the consultant about the actual work carried out and the claims of "running bills and final bill". However, the very same dispute was referred to the arbitrator and the arbitrator after consideration found that the claim raised of the balance payment due under claim no. 8 was due and payable and thus the arbitrator has awarded the same. I do not see any reason to interfere with the said finding of fact recorded by the learned arbitrator. It is not possible for me to scrutinise the accounts for the purpose of determination that whether the running bill or final bill contained the accurate claim or not as per the correct or in accordance with the work carried out by the petitioner. I am of the view that such exercise has to be left to the decision of the arbitrator and the arbitrator is the sole authority to determine the same. This Court in jurisdiction under section 34 cannot re-determine the work

actually carried out and the amount computed thereon is payable or not.

8. This leads me to the last contention raised by the learned counsel for the petitioner that the arbitrator has awarded excess interest of 18% per annum. He has further contended that the arbitrator was totally wrong in directing that the amount should be paid in six months and if not paid within the period of six months, the said amount will carry interest at the rate of 18%. I do not see any reason under section 34 of the Arbitration and Conciliation Act, 1996 to interfere with the said rate of interest as stipulated by the learned arbitrator. However, the learned counsel for the respondent has submitted that they will claim interest at only 10% throughout i.e. in respect of the claim prior to the date of reference, during the pendency of the reference and even subsequent to the passing of an award i.e. till payment and/or realisation. Accordingly, I award interest at the rate of 10% on the principal amount of the claim. I accordingly, modify the said award to the extent that the rate computed on the principal amount will be at the rate of 10% and not 18% per annum.

9. The learned counsel for the petitioner has raised no other issues before me. In the aforesaid circumstances, the arbitration petition partly

succeeds and is disposed of with the modification in the rate of interest as aforesaid. However, there shall be no order as to costs.